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No. 86-3

In The
Supreme Court of the United States
October Term, 1986

SUZANNE LINDLEY DALY,
Petitioner,

vs.

NAN TOEWS DALY,
Respondent.

MOTION OF WOMEN LAWYERS' ASSOCIATION OF LOS ANGELES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI; BRIEF AMICUS CURIAE

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Women Lawyers' Association of Los Angeles respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorneys for petitioner has been obtained, but the attorney for respondent refused to consent to the filing of this brief.

Applicant has an interest in this case because it is an organization whose members are female and male lawyers, judges and law students, many of whom are or expect to become parents. As lawyers, applicant's members also represent clients whose parental rights may be unfairly or arbitrarily terminated by reason of their membership in a disfavored minority group. Applicant and its members are concerned with the importance of preserving the fundamental right of parenthood from arbitrary and discriminatory termination.

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The attached brief is filed in support of the petition for a writ of certiorari. Applicant believes that the issues of due process and equal protection raised by this case are not adequately addressed by the petition. If applicant's arguments are approved by this Court, the Court should grant certiorari in this case.

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—INTEREST OF AMICUS CURIAE—

Amicus curiae is a local bar association whose members are female and male lawyers, judges and law students concerned with promoting the legal and social rights of women. Many of the members of *amicus* are or anticipate becoming parents. As lawyers, it members also represent female and male clients whose parental rights may be unfairly or arbitrarily terminated by reason of their membership in a disfavored minority group. *Amicus* and its members are personally and professionally concerned with the importance of preserving the fundamental right of parenthood from arbitrary or discriminatory termination. *Amicus* therefore submits this brief in support of the petition for writ of certiorari.

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—INTRODUCTION—

Petitioner Suzanne Lindley Daly is the natural parent of Mary Toews Daly. Suzanne's parental rights were totally and permanently terminated because she underwent sexual reassignment surgery and therapy. Such treatment is medi - cally approved and is the only successful treatment for the condition known as "gender dysphoria."

The opinions and findings of fact and conclusions of law attached as an appendix to the petition reveal that Suzanne was never found to be an unfit parent. Rather, her parental rights were terminated because the trial court felt the parent-child relationship was emotionally difficult for Mary and that such termination was therefore in the best interest of the child.

Termination proceedings were initiated by an admittedly vindictive former spouse. The State of Nevada was never involved in the proceedings, although as parens patriae it has a strong interest in maintaining and fostering the parent-child relationship. As a result of the decree, Mary is now totally dependent upon respondent for support; the child has no right to inherit from Suzanne or to bring an action for wrongful death, and the state has no right to look to Suzanne for child support in the event respondent dies or becomes unable to support Mary. Similarly, Suzanne's rights to communicate with and to support her only child, as well as other rights inherent in the parent-child relationship, have been totally and permanently severed.

—SUMMARY OF ARGUMENT—

The decision of the Supreme Court of the State of Nevada, affirming the permanent termination of petitioner's parental rights on the ground of the perceived "best interest of

the child," without a finding that petitioner is unfit, violates the equal protection and due process clauses of the Constitution.

Petitioner's parental rights were terminated without the unfitness finding mandated by this Court in *Stanley v. Illinois*, 405 U.S. 645, 649 (1972). The trial court record reveals that the hearing which preceded the termination of petitioner's parental rights did not focus on her fitness or unfitness as a parent; rather, the trial judge permitted a great deal of inflammatory and prejudicial—but irrelevant—testimony and argument concerning such side issues as whether petitioner's expert witness was a "pervert" and whether the child would consort with "perverts" if petitioner were allowed to retain her parental rights.

The trial was conducted in an atmosphere of hysteria, depriving the trial of the fairness and decorum to which petitioner was entitled. In fact, the state court opinions attached to the petition confirm that the true ground for terminating petitioner's parental rights is that she is a former transsexual, having undergone the medically approved and perfectly legal procedure of sexual reassignment surgery.

Petitioner's rights to due process have thus been violated, in that she has been deprived of her fundamental right of parenthood without a fair hearing and a finding that she is an unfit parent, and because of her status, rather than for any unlawful conduct. Furthermore, the lower courts acted in excess of their jurisdiction in terminating petitioner's parental rights without a finding of unfitness. Petitioner's right to equal protection of the laws has also been violated, in that parents who are not classified as transsexual are not deprived of their parental rights unless they are found to be unfit.

—ARGUMENT—

A. The State of Nevada Violated Petitioner's Right To Due Process Of Law By Permanently Depriving Her Of Her Fundamental Rights As A Natural Parent In A Trial Infected By Appeal To Inflammatory Passion And Prejudice

It has long been the rule of law that persistent appeals to prejudice and passion have no place in the American courtroom. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-40 (1940); *New York Central R. Co. v. Johnson*, 279 U.S. 310, 319 (1929). Indeed, such appeals are improper and where a verdict results from appeals to passion, prejudice or caprice, the court must order a new trial, whether the proceeding be civil or criminal. *Minneapolis, St.P & S.S.M. Ry. Co. v. Moquin*, 283 U.S. 520 (1931); *United States v. Berger*, 295 U.S. 78, 85 (1935); *Gibbs v. United Mine Workers of America*, 343 F.2d 609, 616 (6th Cir. 1965).

Respondent herein adopted a trial strategy that can only be characterized as a persistent appeal to prejudice against transsexual stereotypes which placed petitioner at a "severe disadvantage" before the trial court . *United States v. Turoff*, 291 F.2d 864, 866-68 (2d Cir. 1961) (conviction reversed in face of overwhelming evidence of guilt where prosecutor elicited evidence of defendant's past association with the Communist party). A brief review of the most inflammatory remarks leads to but one conclusion: that Suzanne Daly lost her fundamental right to be Mary Daly's parent in a pro - ceeding so infected with innuendo and sensationalism unsup - ported by facts in the record and lacking in dispassionate

in dispassionate analysis that to call it a fair trial does a grave disservice to the time-honored precept of due process of law.

Although the trial commenced in a relatively civilized manner, it quickly degenerated when the court permitted respondent, over petitioner's objection, to offer what amounted to expert testimony that Mary Daly would be at risk of contracting AIDS if she were permitted to visit Suzanne Daly. This testimony was premised on respondent's unsupported belief that Suzanne Daly associates regularly with homosexuals as a result of her gender dysphoria and attendance at counseling sessions. II ROA 40-44.

That such uninformed testimony was permitted did not bode well for Suzanne Daly's right to a fair trial.

Respondent's counsel next cross-examined Lin Fraser, a psychotherapist at the counseling center Suzanne Daly attended on a regular basis. Despite a complete absence of competent evidence establishing that Mary Daly did not want to see her father, counsel pursued a line of questioning, over petitioner's objection, premised on that "fact." II ROA 154-157. From this point on, the trial became nothing more than a referendum on homosexuality, an issue that was completely irrelevant to the gender dysphoria afflicting Suzanne Daly. Lin Fraser was subjected to a barrage of questions based on the premise that Mary would be surrounded by homosexuals, transvestites and lesbians if Suzanne Daly's parental rights were not terminated. II ROA 163-167 (Q: "Homosexuals and transsexuals and all the perverts are more accepted in San Francisco than they are in a small town like Reno, is it not?").

The next witness was Andrea Cannaan, a social worker at Suzanne Daly's counseling center. After testifying that she had observed Suzanne and her daughter on occasion and that they seemed to have a good relationship, respon - dent's counsel commenced her cross-examination, over objection, by immediately delving into the personal sexual history and relationships of the witness. Counsel had the audacity (and the court's apparent sanction) to ask the witness whether she had ever slept with Suzanne Daly and to suggest several times that the witness really wanted to start a lesbian relationship with Suzanne Daly. II ROA 176-186. In the course of the questioning, respondent's counsel remarked on the race of the witness (black) and the birth of her daughter (out of wedlock). This attempted "moral impeachment" was permitted even though it was plainly irrelevant to Ms. Cannaan's testimony and served only to focus the court on obviously inflammatory topics.

Respondent's blatant appeal to homophobic prejudices again reared its ugly head when Suzanne Daly took the stand. On cross-examination, respondent's counsel queried petitioner about her "admitted Lesbian" friends. II ROA 316. Question: "It wouldn't bother you a bit if Mary became a lesbian, would it?" II ROA 324. Question: "And you don't mind if she would associate with homosexuals?" II ROA 325. Question: "Now you want to guide her to accept your lifestyle with lesbians and transsexuals and homosexuals? You want to give her that direction and you think that is just okay?" II ROA 332-33. Question: "If you did care about her, you'd discontinue your lifestyle, and live the way you lived before and that was as a man." II ROA 360. Question: "You're only thinking of yourself, isn't that true?" II ROA 360.

The closing argument was essentially a diatribe premised again—without support in the record—on the "fact" that Suzanne Daly lived in a world populated only by lesbians, homosexual and other "perverts." A sampling of the argument reveals its flavor:

> "[Mary] relates well to people, to her teachers, to her peers, to her friends. Shall we keep her that way or shall we take a risk and put her in an environment of Lesbians, Gays, Homosexuals, Transsexuals, and Perverts?
>
> "Webster defines Perverts as any person who prefers any sexual acts and practices considered to be abnormal.
>
> "Abnormal is defined as not normal or typical, and irregular.
>
> "Normal is conforming to an accepted standard, naturally, and usual.
>
> "Suzanne Daly is a Transsexual. She is not normal. While she says she has Lesbian friends, she says she loves Lesbians. She loves Gays. She loves Transsexuals. And her Lesbian friend says that their personal relationship is quite wonderful and they laugh and have a lot of fun. She wants us to believe that this is normal.
>
> "I say that Suzanne Daly is not normal and isn't con - sidering her daughter's needs and is thinking only of her own heeds and her own desires... I say that Suzanne Daly has a disturbed sense of values." III ROA 4.
>
> "This is poor judgment to say, Mary, you are going to go to the doctor, Mary, so that you can accept a life style adapted to lesbianism, Transsexuals, Homosexuals, and Perverts, so that you can be accepting this in your own mind." III ROA 7.
>
> "I am not a bigot... Let them do whatever they want to do. I couldn't care less; but don't drag this nine year old child in that horrible life style.

> "Surely they are human beings. I respect that. I have known many people who are blacks. I love blacks. I have a black housekeeper, who is in my house, who takes care of my house and me. And she cooks my dinners. We are as close as we can be. And, yet, I am not a hateful person, nor do I hate blacks.
>
> "I wanted to make a record that this lady Lesbian that came in here and tried to prove that it would be all right for Mary to come in the house where a Lesbian is; I just don't buy it. I am not a bigot, but I just don't associate myself with it.... We are the ones who are Perverts because we don't think the way they think." III ROA 30.

It is difficult to believe that such a passionate and persistent appeal to prejudice, stereotypes, and ignorance could occur in a courtroom in 1983. Yet this trial is a tragic reminder that unpopular, misunderstood, or shunned minority groups in our society oftentimes can rely only on the Due Process Clause as their sole recourse from private biases and unfair treatment. Suzanne Daly did not receive a fair adjudication of her right to remain Mary Daly's parent. Instead, she was a victim of a proceeding overwhelmed by invidiously bigoted speeches on the dangers of homosexuality and other "perversions" and inappropriate questioning of her witnesses. This was not a dispassionate search for truth but a call to judgment on issues unrelated to Suzanne Daly's fitness to be a parent.

This Court has recognized that the "Constitution cannot control [private] prejudices but neither can it tolerate them." *Palmore v. Sidoti*, 466 U.S. 429, 435 (1984). The unfairness of the trial below based on the inflammatory atmosphere generated by respondent and her counsel compel this Court to grant Suzanne Daly a new trial where her fundamental and precious right of parenthood can be addressed with the solemnity and respect it deserves.

B. Depriving Petitioner, A Former Transsexual, Of Her Parental Rights Without A Finding Of Unfitness Violates The Equal Protection Clause Of The Fourteenth Amendment

The integrity of the family and the right to be a parent have long been recognized as protected by the Equal Protection Clause of the Fourteenth Amendment. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) ; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ; *Skinner v. Oklahoma* , 316 U.S. 535, 541 (1942). This Court held in *Stanley v. Illinois, supra*, and recently reaffirmed in *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), that due process prohibits terminating the fundamental right of parenthood unless the parent is found to be actually unfit, and that a presumption that a particular class of persons is unfit to be parents is unconstitutional.

Recent decisions of this Court involving the discriminatory deprivation of fundamental parental rights have dispensed with the traditional "suspect classification" analysis often used in equal protection cases. Thus, in *Stanley v. Illinois, supra*, an unwed father's status was held to have been unconstitutionally and discriminatorily singled out. The Court found that while Illinois had a legitimate goal of protecting the interests of the child and of the community and to strengthen family ties, 405 U.S. at 653, the state "spites its own articulated goals" when it needlessly separates a parent from his children on the basis of a legislative presumption that an unmarried father is an unfit parent, without reference to individual circumstances. 405 U.S. at 653-655. Without declaring unwed fathers to be a "suspect class" entitled to special protection, the Court held that the state could not

deprive a parent of fundamental rights on the sole ground of the parent's status as an unmarried father.

Similarly, in the present case petitioner was singled out for termination of parental rights because of her status as a former transsexual. There was no evidence that transsexuals as a class are unfit to be parents; on the contrary, the evidence was that there are good and bad transsexual parents, just as there are good and bad parents who are not transsexuals. Nevertheless, Suzanne Daly's parental rights were terminated without the trial court ever finding that Suzanne Daly as an individual was an unfit parent. This result directly violated the requirements of *Stanley*.

Other cases since *Stanley* have also assumed that the fundamental right of parenthood is not dependent upon special protections afforded to "suspect classes." In *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981), the Court assumed that a parent sentenced to a long prison term was entitled to a fair hearing as to her unfitness, and the only issue was whether she was entitled to appointed counsel in such a proceeding; the parent's status as a convicted felon was not even mentioned as having a bearing on her right to the finding mandated by *Stanley*.

Finally, in the more recent case of *Palmore v. Sidoti*, *supra*, 466 U.S. 429 (1984), the Court held that a parent's custodial rights could not be terminated solely because of her racially mixed marriage, absent a finding that she was an unfit parent. 466 U.S. at 432. The *Palmore* opinion did not base its analysis on the fact that race is well established as a suspect classification subject to strict scrutiny. Rather, it condemned the trial court's surrender to racial prejudice in lieu of the constitutionally required inquiry into the fitness of the individual.

The prejudice against interrracial marriage which this Court disapproved in the *Palmore* opinion quotes the relevant parts of the lower court's opinion:

> "The wife has chosen for herself and for her child, a life-style unacceptable to the father and to society.... The child...is, or at school age will be, subject to environmental pressures not of choice.... The father's evident resentment of the mother's choice of a black partner is not sufficient to wrest custody from the mother. It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare. This Court feels that despite the strides that have been made in bettering relations between the races in this country, it is inevitable that Melanie will, if allowed to remain in her present situation and attains school age and thus more vulnerable to peer pressures, suffer from the social stigmatization that is sure to come." 466 U.S. at 431.

This court noted that the *Palmore* trial court had rejected any claim that the mother was unfit and candidly placed its holding on the sole ground of race. 466 U.S. at 432.

The same kinds of bias which underly the *Palmore* trial court's attitudes toward interracial marriage and nonmarital sexual relationships can be recognized in the trial court's attitudes in this case. The trial court's findings included the following remarks:

"One of the important single factors to be considered is the moral character and emotional stability of the [petitioner] Suzanne Lindley Daly, since she would create the moral environment the child would be in if Mary were in her physical custody during any exercise of visitation rights....

"The record and testimony fairly reflects that there is a risk if the child were accorded parental rights, visitation, etc. She has a risk to be put in an environment of persons who prefer sexual minorities which are not normal or typical or are irregular and not generally accepted by society. The court finds that Mary is under emotional distress over this situation at this time.

"The Court is of the opinion that [Suzanne] is a selfish person to [her] own needs, [her] own desires, [her] own wishes, and is not thinking in a realistic way about Mary.

"[Petitioner] Suzanne wants this 9 year old daughter to accept her life style in her life, regardless of what could be a very serious thing to a little girl. Suzanne made her choice. It does show disregard for this child's well being and this child's welfare. The indications are that [petitioner] Suzanne has some very serious emotional problems. Mary doesn't need exposure to a person who has what Dr. Pauly calls a 'gender identity' problem or who is undergoing psychotherapy treatment for the same, which is dramatic and emotional." Petitioner's Appendix 32-34.

Like the *Palmore* trial court, the trial court in this case candidly based its termination decree on its prejudice against transsexuals. It did not find Suzanne to be unfit, but, like the *Palmore* trial court, it assumed that exposure to "sexual minorities" which are not generally accepted socially or are "not normal or typical" would be detrimental to the child. Again like the *Palmore* trial court, it found Suzanne to be "selfish" because she obtained treatment for her medically-diagnosed gender dysphoria, contrary to what the court felt

was the child's emotional well-being and need for social acceptance.

In *Lehr v. Robertson*, 463 U.S. 248 (1983), this Court expressly recognized that parental rights may not be terminated "based solely on differences that are irrelevant to a legitimate governmental objective." 463 U.S. at 265. Suzanne's successful sexual reassignment is such a difference. While it undoubtedly raises many difficult emotional issues for all concerned, the trial court did not find it made Suzanne unfit to be a parent. There was no showing that her status prevents her from providing moral and intellectual guidance to her child, financial support or companionship if the child and her mother were willing to permit such contributions.

The present case is significant not only for the unfair and discriminatory effects on the parties, but also for its potential as dangerous precedent. If the decision of the Supreme Court of Nevada is allowed to stand, it would justify excepting many other disfavored statuses from the protection of *Stanley v. Illinois* . For example, depending on their particular prejudices, trial courts could in the future feel empowered to dispense with proof of unfitness when terminating the parental rights of undocumented aliens, of persons suffering from certain feared diseases, of dying persons, of drug addicts or alcoholics, or the poor or homeless or those on welfare, of persons with certain physical handicaps, of the mentally ill, of homosexuals, or of the practitioners of certain religions.

Moreover, if allowed to stand the present decision would allow discrimination against children as well as their parents. In *Santosky v. Kramer*, *supra*, this Court recognized that parental termination proceedings have profound effects on

the rights of children as well as on those of their parents. Quoting a Colorado decision, the Court observed:

> "The child loses the right of support and maintenance, for which he may thereafter be dependent upon society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for a limited period, but forever." 455 U.S. at 760, n. 11.

In his dissent in *Santosky*, Justice Rehnquist also recognized that "[t]he child has an interest in the outcome of the factfinding hearing independent of that of the parent." 455 U.S. at 788, n. 13.

If the present decision were allowed to stand, it would authorize discriminatory treatment not only of parents but also of their children. Where, as here, the state is not involved as a party to the termination proceedings and therefore lacks the opportunity to represent the best interests of the child, the ability of a vindictive parent to sever the entire relationship be - tween the child and the disfavored parent may depend on the particular prejudices of the court. In the present case, although Mary Daly had been taught to think of Suzanne as "dead" and stated her desire not to see her again, Mary at 9 years old was hardly in a position to understand all the ramifications of such a decision. Thus, the child of a parent of disfavored status is also vulnerable to the serious consequences of discriminatory severance of the parent-child relationship.

—CONCLUSION—

The trial below was not a fair adjudication of Suzanne Daly's right to remain a parent of Mary Daly. It was simply an impermissible appeal to prejudice grounded in innuendo and sensationalism. As a result, Suzanne Daly's fundamental right of parenthood was extinguished without due process of law. Similarly, the termination of this fundamental right is based solely on nothing more than Suzanne Daly's disfavored status as a former transsexual. Consideration of this status as the sole basis for the loss of Suzanne Daly's right to be a parent violates the Equal Protection Clause of the Fourteenth Amendment. The termination of Suzanne Daly's right must be reversed.

Respectfully submitted.

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